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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 352

KENNETH REED and REBECCA REED, *Petitioners,*

vs.

STATE OF NEW MEXICO, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO AND SUPPORTING BRIEF AND MOTION TO HAVE CERTAIN PRINTING COSTS TAXED AGAINST RESPONDENT.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 352

KENNETH REED and REBECCA REED, *Petitioners,*

vs.

STATE OF NEW MEXICO, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO.

To the Honorable Fred M. Vinson, Chief Justice of the Supreme Court of the United States and to the Associate Justices of said Court:

Your petitioners, Kenneth Reed and Rebecca Reed, respectfully pray for a Writ of Certiorari herein, to review a certain final decision upholding the conviction of petitioner, Kenneth Reed, upon one count charging theft of a bull calf and upon another count of unlawfully branding a bull calf, and upholding the conviction of petitioner Rebecca Reed upon a count of unlawfully branding such calf (Tr. p. 28; pr. r. pp. 15-16), which final decision was rendered on March 16th, 1951, by the Supreme Court of the State of New Mexico (the highest court of said state), in cause No. 5313, entitled "State of New Mexico, plaintiff-appellee *vs.* Kenneth Reed and Rebecca Reed, defendants-

appellants, and to review that certain order of said Court, without written opinion, overruling petitioners' seasonable Motion for Rehearing, filed on May 23d, 1951 (Tr. p. 678; pr. r. pp. 112-120), by which decision and by which order, as evidenced by the certificate filed herein by the Chief Justice of the Supreme Court of the State of New Mexico (Tr. p. 688; pr. r. p. 120), said Court of said State held that there was no impairment of petitioners' rights under the Fourteenth Amendment to the Federal Constitution, with respect to a denial of due process, a fair and impartial trial, or the equal protection of the laws, as well as the abridgment of petitioners' privileges and immunities, in connection with:

The Questions Involved Herein

The points to which petitioners take exception as decided by said inferior Court, are expressed herein in terms suitable to the contentions of these petitioners, as follows, to-wit:

1. Want of Jurisdiction of Subject Matter

The entry of an order by the resident district judge (Tr. p. 6; pr. r. p. 2) disqualifying himself and appointing a neighboring judge to try this case, which order was entered before a preliminary hearing and before an Information had been filed, is void for want of jurisdiction over the subject matter, and such absence of jurisdiction could not be cured by relating back, or validated by stipulation of the parties (Tr. p. 6; pr. r. p. 3), and violates the Constitutional right to be tried by a judge competent to act.

2. Refusal to Give An Instruction Required by Law

The failure of the highest court of the State to reverse (Tr. p. 568; and 569; pr. r. p. 108) the denial by the trial

court, over objection, (Tr. pp. 27, 28 and 409; pr. r. pp. 14, 15 and 93) of a requested instruction, favorable to the defendants, involving the weight and measure of particular evidence, the giving of which instruction had been made mandatory by both statute and settled decisions of said state court, violated the said constitutional rights of said petitioners and each of them under the Fourteenth Amendment to the Federal Constitution.

3. Appellate Courts Should Take Judicial Notice of Laws of Nature

The failure of the highest Court of the State to take judicial notice of the laws of nature, the effects of the passage of time, and the growth of animals (Tr. pp. 565-566; pr. r. p. 106) even when called to their attention on appeal for the first time, in that form, is such a fundamental error as to constitute an abridgment and denial of said constitutional rights, as called to that Court's attention (Tr. p. 589; pr. r. pp. 115-117) and considered by it (Tr. p. 688; pr. r. p. 120), and the failure of the highest Court of the State, in this cause, to find that petitioners could not possibly have been guilty of the offenses charged fatally violated such rights (Tr. p. 678; pr. r. p. 120).

4. "Due Process" Requires a Decision

Where a question is raised upon appeal to the highest Court of a State (Tr. pp. 483-494; 635-656), and is considered (Tr. pp. 565-566; pr. r. p. 106), the "due process" clause of the Federal Constitution is violated by an opinion and decision which comments upon and considers such a question without in any manner deciding pro or con the issues thus asserted, with regard to judicial notice.

5. State Court Decided Federal Questions of Substance Contrary to Decisions of This Court

The highest Court of the State decided Federal questions of substance to the effect that there was no denial to petitioners of due process or of a fair and impartial trial or of equal protection of the laws in the action of that Court in sustaining the ruling of the trial court in refusing to give petitioners' requested instruction No. 6, made mandatory by State statute and by the settled practice of the courts of the State, which affirmance was contrary to the decisions of this Court.

The State Supreme Court violated the rights of petitioners to due process and equal protection of the laws, under the Federal Constitution (Tr. pp. 568-569; pr. r. p. 108), rendering a decision which flatly contradicted and failed to abrogate a State statute clearly prohibiting such a decision (Tr. pp. 568-569; pr. r. p. 108), and which statute rendered mandatory a decision contrary to that which was rendered, which decision involved the requested instruction No. 6, as to weight to be given evidence offered by the prosecution, in the form of the duly certified copy of a brand certificate reflecting the brand of petitioner, Kenneth Reed, which brand was on the calf "discovered" on the ranch of petitioners (Tr. p. 568; pr. r. p. 108).

The statute provided that in all such prosecutions for theft and other violations with respect to neat cattle, such certificate "shall be" *prima facie* evidence of ownership (Tr. p. 480; pr. r. p. 108).

Statement of the Case

These petitioners, who are husband and wife, were at all times material hereto and are now cattle and sheep raisers maintaining a ranch of seven thousand acres, in Union County, New Mexico (Tr. p. 195; pr. r. p. 70).

The prosecuting witness, Olen Caviness, complained to the cattle inspector, John Messick (Tr. p. 69; pr. r. p. 22), that a valuable pedigreed Hereford bull-calf four days of age (Tr. p. 64; pr. r. p. 18) had disappeared from his ranch in an adjoining county (Tr. p. 61; pr. r. p. 17), at which time it weighed 75 to 85 pounds (Tr. p. 87; pr. r. p. 37). He testified at the trial that he had tattooed the numeral "11" under the left flank of the calf when it was three days old (Tr. p. 70; pr. r. p. 27) and that each of said digets "1" were one-half inch in length when put on the calf (Tr. p. 87; pr. r. p. 37). About five months later, cattle inspectors went to the ranch of petitioners and "discovered" a bull calf with two small marks on its left flank (Tr. p. 74; pr. r. p. 37). On December 22d, 1949, when this last mentioned calf was over seven months of age, it weighed about 500 pounds (Tr. p. 87; pr. r. p. 37). It was stipulated that one of the marks on its flank was one-half inch in length at that time, seven months after the Caviness calf disappeared (Tr. p. 459; pr. r. p. 38) and the other mark was 5/8 of an inch in length (Tr. p. 459; pr. r. p. 38). When "discovered" on the Reed ranch, the calf was branded with the brand of petitioner, Kenneth Reed (Tr. pp. 108 and 419; pr. r. pp. 29 and 99).

Later these petitioners were arrested, but before their preliminary hearing and before an information was filed, the resident district judge disqualified himself and made and entered an order naming Judge Hensley, of an adjoining judicial district, to try petitioners (Tr. pp. 6 and 7; pr. r. pp. 2, 3).

Jurisdictional Grounds

On June 22, 1951, the Honorable Eugene D. Lujan, Chief Justice of the Supreme Court of the State of New Mexico, filed in this cause a certificate (Tr. p. 684; pr. r.

p. 120) as to the effect of the order without opinion (Tr. p. 678; pr. r. p. 120), overruling petitioners' Motion for Rehearing (Tr. p. 582; pr. r. p. 112), in words and figures as follows, to-wit:

> CERTIFICATE OF THE CHIEF JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW MEXICO AS TO THE EFFECT OF AN ORDER, WITHOUT OPINION, OVERRULING APPELLANTS' MOTION FOR REHEARING.
>
> I, EUGENE D. LUJAN, Chief Justice of the Supreme Court of the State of New Mexico, do hereby certify that the Supreme Court of the State of New Mexico explicitly overruled each and all of the contentions of the appellants as to violations of Federal Constitutional rights made in their Petition for Rehearing filed in this Court, and the decision of the Supreme Court of the State of New Mexico, without written opinion overruling said Motion for Rehearing, is to be considered as holding against each and all of said contentions.
>
> Dated this 22nd day of June, 1951.
>
> s/ EUGENE D. LUJAN,
> *Chief Justice of the Supreme Court of the State of New Mexico.*

conforming to the decisions of this Court in *Indiana* vs. *Brand*, 303 U. S. 95; and *Lesenba* vs. *California*, 314 U. S. 219; 86 L. Ed. 166; 54 Amer. Jur. 891, Note 9.

This Court has jurisdiction, as provided in Title 28, U. S. C. A. Sec. 344, to review the action of the court below:

1. Where the highest State court erroneously and in violation of the rights of petitioners under the 14th Amendment to the Constitution of the United States, construed the statute of the State of New Mexico (Section 42-704, N. M. S., 1941), so as to deprive petitioners of their right

to due process, equal protection of the laws, and to a fair and impartial trial, in holding:

> "It is obvious that the statute merely sets up a procedure that may be followed by the State in a criminal prosecution of this kind to prove ownership of the animal involved. The Statute was not intended to be available to a defendant in such a case."

Which opinion was thus rendered in spite of the mandate of the statute that:

> "In the prosecution of any offense arising under the laws of this State in regard to the unlawful taking, handling, killing, driving or other unlawful disposition of animals of the bovine kind, the . . . proof of the brand . . . shall be *prima facie* proof that the person owning the recorded brand is the owner of the animal branded with such brand."
>
> Sec. 42-704, New Mexico Statutes Annotated, 1941 (Tr. pp. 568-569; pr. r. p. 108).

Where objection was made in the trial court to the refusal of that court to give requested instruction No. 6 (which followed the language of the above mentioned statute) (Tr. pp. 27, 28, 409; pr. r. p. 15), and where error was assigned (Tr. p. 461; pr. r. p. 101), where denial of equal protection and denial of the right to a fair and impartial trial were raised by petitioners in their Brief in Chief (Tr. p. 481; pr. r. p. 115), and where these petitioners in their Motion for Rehearing and supporting Brief raised the constitutional questions (Tr. pp. 585, 586, 629; pr. r. p. 112-117), available to them for the first time which were each and all "explicitly overruled" by the order overruling the Motion for Rehearing (Tr. p. 684; pr. r. p. 120), in spite of the fact that the opinion was contrary to the established law of the Court and State (*State* vs. *Hughes*, 43 N. M. 109, 86 Pac. 2nd 278; *Ter.* vs. *Pino*, 9 N. M. 598, 58 Pac. 393).

The information was filed and subsequently Judge Hensley proceeded to preside at a trial of defendants (Tr. pp. 54-56; pr. r. p. 3) without any authority other than the premature order (Tr. p. 6).

After the evidence was in petitioners' requested instruction No. 6 (Tr. p. 27; pr. r. p. 13) to the effect that proof of the brand was *prima facie* proof of ownership by Kenneth Reed of the calf on his ranch bearing his brand (Tr. p. 27) but the requested instruction was refused (Tr. p. 28; pr. r. p. 13) to which petitioners objected (Tr. p. 409; pr. r. p. 13).

After the verdict (Tr. pp. 28 and 410; pr. r. pp. 15 and) and sentences (Tr. pp. 411-414; pr. r. p. 29) petitioners appealed to the highest Court of the State (Tr. p. 30; pr. r. p. 30).

That Court affirmed the judgment and sentences pronounced by the trial court (Tr. p. 572; pr. r. pp. 103-111) and overruled the motion for rehearing (Tr. p. 678; pr. r. p. 120).

2. Another ground for this Court taking jurisdiction and granting the relief prayed for, lies in the want of jurisdiction over the subject matter created by the premature order (Tr. p. 6; pr. r. p. 2) entered before indictment (Tr. p. 7; pr. r. p. 3), covered by Assignment of Error I (Tr. p. 461; pr. r. p. 101), where "equal protection of the laws was relied on (although in reference to that clause of our State Constitution) and where the Federal questions were thoroughly presented by the Motion for Rehearing (Tr. pp. 583-585; pr. r. p. 112-118) and were specifically decided (Tr. pp. 678 and 684; pr. r. pp. 120 and 121), and the question comes squarely within the jurisdiction of this Court under the following decisions:

Whitfield vs. *Ohio*, 297 U. S. 431; 80 L. Ed. 778;

Mobile vs. *Miss.*, 210 U. S. 187, 25 C. J. 949, Note 33, 36 C. J. S. 177, note 36;

International Harvester Co. vs. *Kentucky*, 234 U. S. 589;

Stewart vs. *Michigan*, 232 U. S. 665, 58 L. Ed. 786;

Filer vs. *Steele*, 228 Fed. 242;

Jamison vs. *Wimbish*, 130 Fed. 351.

3. This Court has jurisdiction to consider whether or not petitioners were denied due process, under the Federal Constitution, where the highest Court of the State considered the question of the growth of the skin of the animal involved, but did not decide whether or not it would take judicial notice of facts which clearly demonstrated the innocence of petitioners. Although other points were raised on appeal, there was a failure to accord due process where that important question was considered by the highest State Court, and was disposed of with the following comment, in the opinion:

> "They also pointed out that the tatoo marks on the calf had not enlarged, although the calf that was lost would have grown since its disappearance."

and where appellants (these petitioners) had their first opportunity to raise the Federal question in their motion for rehearing (Tr. p. 637; pr. r. p. 116), which gives jurisdiction to this Court, under the decisions of this Court in *Great Northern Ry. Co.* vs. *Sunburst Oil & Ref. Co.*, 287 U. S. 358; *Brinkerhoff-Faris Trust & Savings Co.* vs. *Hill*, 281 U. S. 673. But in this case, all the constitutional questions were considered and overruled by the order without opinion denying the Motion for Rehearing (Tr. p. 684, pr. r. p. 120).

4. In addition to the Federal question above referred to respecting failure of the Supreme Court of the State of New Mexico to decide, one way or another, the question of judicial notice, these petitioners, in spite of the decision of this Court, *Wear* vs. *Brewster*, 245 U. S. 154, believe that this Court, no more or no less than any inferior court, must, of necessity, take judicial notice of facts clearly demonstrating the innocence of these petitioners, and, when such facts are thus judicially noticed, where they were twice presented and twice ignored by the inferior appellate court, and where the obvious want of due process under the Federal Constitution, flowing from such fundamental error below, would permit the innocent to be punished, this Court has jurisdiction to entertain and allow the petition for Writ of Certiorari. This would be in keeping with the exception to "the trial court rule" laid down in *People* vs. *Donahoe*, 250 U. S. 634, where "the application of the rule would result in great injustice."

WHEREFORE your petitioners respectfully pray that the Writ of Certiorari issue and for all just and proper relief in the premises.

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ROBERT HOATH LA FOLLETTE,
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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

For their Brief in support of their Petition for Writ of Certiorari, petitioners respectfully show to the Court:

I.

Statement of Jurisdiction

This Court has jurisdiction under Title 28, Sec. 1257 (3) U. S. C. A. and Title 28, Section 2106 U. S. C. A. The Federal questions involved in this matter were raised in the Supreme Court of New Mexico and considered by the said Supreme Court of New Mexico (as shown by the Certificate of Chief Justice Eugene Lujan of the Supreme Court of New Mexico) (Tr. p. 684; pr. r. p.), conforming to the requirements of the following decisions:

> "A certificate of the justices of the State Court as to what is intended by portions of the opinion may be made a part of the record." 54 Am. Jur. 891, Note 8; *Indiana* vs. *Brand,* 303 U. S. 95.
>
> "On a record containing a certificate by the Chief Justice of the highest Court of a State that the Court had explicitly overruled the contentions of violations of Federal Constitutional rights, made in a petition for rehearing, and that the decision denying a rehearing, is to be considered as holding against such contentions, the Supreme Court has jurisdiction to review the judgment." 54 Am. Jur. 891, Note 9; *Lesenba* vs. *California,* 314 U. S. 219, 86 L. Ed. 166.

II.

Statement of Facts

The defendants-appellants, Kenneth Reed and Rebecca Reed, his wife, live on a 7000-acre livestock ranch in Union County, New Mexico (Tr. p. 177), and the prosecuting

witness, Olen Caviness, is a breeder of registered Hereford cattle (Tr. p. 43) and lives in Raton, and operates his ranch at Maxwell and on Johnson Mesa, in Colfax County (Tr. p. 43).

On April 25th, 1949, one of his Hereford cows gave birth to a bull calf (Tr. p. 44). On April 27th, 1949, two days after its birth, he placed a tattoo mark on the left flank (Tr. p. 52) of the calf, consisting of the figure "11" (Tr. p. 52). He last saw the calf in his pasture on April 29th, 1949 (Tr. p. 46). He returned on May 1st, 1949, and found the little, five-day old calf was gone (Tr. p. 51). He went back on May 2d, 1949, to look for it without success (Tr. p. 51), so he called the brand inspector, John Messick, and reported the calf stolen (Tr. p. 51). During the following five months Olen Caviness and the brand inspector were unable to find the lost bull calf (Tr. p. 56). On October 6th, 1949, Caviness went with the brand inspector, Messick, and some other officers to the Reed ranch (Tr. p. 56), and found a bull calf that he claimed had tattoo marks on it (Tr. p. 57). The tattoo marks, however, on the calf in which Caviness claimed ownership were approximately the same size as those which he claimed to have put on the new born calf (Tr. 261, 262).

III.

Statement of the Case

The Supreme Court of the State of New Mexico, on the 16th day of March, 1951, rendered a final opinion and decision affirming the conviction of Petitioners on charges of unlawfully branding one head of neat cattle, contrary to the provisions of Section 41-411 New Mexico Statutes of 1941 Annotated, and affirming the conviction of Kenneth Reed of stealing one head of neat cattle, to-wit: a bull calf the property of Olen Caviness, contrary to the provisions

of Section 41-419, New Mexico Statutes, 1941 Annotated (Tr. p. 562).

Within the time allowed, these Petitioners, after the rendition of said final opinion and judgment by the Supreme Court of the State of New Mexico, filed in said Court their motion for rehearing, together (Tr. p. 582) with a brief supporting said motion; and within the time allowed, State of New Mexico, Plaintiff-Appellee in said proceedings, by the Honorable Joe L. Martinez, the Attorney General of New Mexico, and his assistants, filed an answer brief upon the motion for rehearing, and thereafter the Supreme Court of the State of New Mexico, without notice of any kind to these Petitioners, denied, without written opinion, said motion for rehearing, and caused a commitment to issue to the Sheriff of the County of Union, State of New Mexico, and to the superintendent of the New Mexico State Penitentiary, commanding them to commit these Petitioners to said penitentiary to serve their sentence (Tr. pp. 678, 679, 680).

Thereafter these Petitioners obtained a stay of said proceedings, and the Clerk of the Supreme Court of the State of New Mexico withdrew the commitment, these Petitioners having furnished good and sufficient bond for that purpose, conditioned upon their prosecuting this cause before this Court (Tr. p. 683).

Petitioner, Kenneth Reed, who had been convicted under both Counts One and Two of the Information as amended, was sentenced by the trial judge upon Count One of the Information to not less than one (1) year, nor more than two (2) years in the State Penitentiary, said sentence (Tr. p. 453) having been suspended upon condition that said Petitioner do not violate the laws of this State or any other State, or the laws of the United States, and upon the further condition that he pay one-half of the costs taxed in

this prosecution; and upon Count Two said Petitioner Kenneth Reed, was sentenced to the State Penitentiary for not less than three (3) years, nor more than three (3) years, and for the payment of a fine to the State of New Mexico for Five Hundred Dollars ($500.00) (Tr. pp. 411-414).

Petitioner, Rebecca Reed, was sentenced upon Count One (1) of the Information to a term in the State Penitentiary for a period of not less than eighteen (18) months and not more than twenty-four months, and to pay one-half of the prosecution taxed in said cause (Tr. p. 413).

The inception of said cause in the District Court of Union County and the State of New Mexico was an Order of that Court (Tr. p. 1) made and entered by the duly elected, qualified and acting District Judge within and for that county, Honorable Fred J. Federici, disqualifying himself from presiding in said cause and naming the Honorable E. T. Hensley, Jr., Judge of the Ninth Judicial District, to preside in "the above-styled and numbered cause to its final determination and in all its phases." Said order was dated December 10, 1949, and was made and entered before a preliminary hearing had been held binding these petitioners as defendants in said cause over to the action of the District Attorney in said District Court and while said District Judge Federici had no jurisdiction in the cause other than as a committing magistrate to hold a preliminary hearing to determine whether or not these petitioners, as defendants, should be bound over to the action of the District Attorney in the District Court of Union County, New Mexico.

After said order had been made and entered designating Judge Hensley, and after the preliminary hearing for these defendants had been held and after said Judge Hensley, sitting as a committing magistrate, ordered them bound over to the action of the District Attorney in said District

Court on the 13th day of December, A. D. 1949, an information was filed (Tr. p. 7) in the office of the Clerk of the District Court of Union County and State of New Mexico, charging these defendants with the offenses hereinbefore set out, and thereafter, without further appointment by the duly elected and qualified District Judge of said District, the Honorable E. T. Hensley, Jr., District Judge of the Ninth Judicial District, proceeded with the trial of these defendants (Tr. p. 54).

During the progress of said proceedings, proof of a brand was received in evidence by the Court in the form of a certified copy of the registration thereof in the Brand Book under the seal of the Cattle Sanitary Board, certified to by the Secretary of said Board, as the brand of the petitioner, Kenneth Reed. This by undisputed evidence was the brand on said bull calf at the time the calf was taken from the Reed cattle ranch by the Sheriff of Union County and other peace officers (Tr. pp. 27-28-390a-400-272).

One Olen Caviness, who was the prosecuting witness in this cause, a producer and breeder of registered Hereford cattle, testified at the trial that on April 29, 1949, he had missed a three-day-old bull calf which had been tattooed under its flank with the figures "11" at which time the calf weighed between 75 and 85 pounds. Some seven months later, when the officers removed a bull calf from the ranch of the Petitioners, the said calf weighed about five hundred pounds, and was branded with the brand of Kenneth Reed. The testimony shows that Rebecca Reed assisted in placing the brand on said calf in the regular course of branding the crop of calves on their cattle ranch. After the Court had given his instructions to the jury, these Petitioners, through their attorney, requested among other things, that the Court instruct the jury as follows:

> "In the prosecution of any offense arising under the laws of this State in regard to the unlawful taking,

handling, killing, driving or other unlawful disposition of animals of the bovine kind the proof of the brand by a certified copy of the registration thereof in the brand book, under the seal of the cattle sanitary board, certified to by the secretary of said board, shall be sufficient to identify all neat cattle, and is primary proof that the person owning the recorded brand is the owner of the animal branded with such brand, and in this case if you find from the evidence that Kenneth Reed is the owner of the recorded brand that you find from the evidence was on the one head of neat cattle, a bull calf, for the stealing of which the defendants are charged in Count 2 of the information as amended, the ownership of said brand by Kenneth Reed is *prima facie* evidence that the defendants owned the animal in question and in deciding this case you are to take such *prima facie* evidence into consideration along with the other evidence in the case, and the law contained in the Court's Instructions in arriving at your verdict."

These appellants before the Supreme Court of the State of New Mexico further contended that the Court should take judicial notice of the fact that from the time a three-day-old calf might be branded with a half-inch tattoo mark on its flank, and seven months later, if the calf weighing 500 pounds found on the farm of these Petitioners could be the same calf as the one which the prosecuting witness had missed when it was three-days-old, the one-half inch tattoo marks placed on the three-day-old calf would of necessity have increased substantially in length, and that consequently the Supreme Court of the State of New Mexico, should have taken judicial notice under its inherent power to take judicial notice of the growth of animals and the laws of nature, that the calf found in the custody of these Petitioners could not have possibly been the three-day-old calf which the prosecuting witness, Caviness, suspected was stolen. The Supreme

Court of the State of New Mexico, in its said final opinion and judgment neither passed upon its power to take judicial notice of such a fact, nor ruled for or against these Petitioners as appellants before said Court, but disposed of that important and decisive question in the case with a short sentence, as follows:

> "They (these Petitioners) also pointed out that the tattoo mark on the calf had not enlarged, although the calf that was lost would have grown since its disappearance" (Tr. pp. 565-566).

IV.

ARGUMENT

Point One

An Order of the District Court of New Mexico for the Eighth Judicial District Requesting the District Judge of Another District to Try a Designated Criminal Case, Such Order Having Been Made and Entered Before the Information Had Been Filed, the Preliminary Hearing Held, and Before the Defendants Had Been Bound Over to the District Court, Is Void for Want of Jurisdiction, and Having Been Acted Upon Violates Due Process of Law and Denies Them Equal Protection of the Law, As Required by the Constitution of the United States.

The district court is without jurisdiction of the subject matter of an offense, until the filing of an information in said court by the District Attorney, and such want of jurisdiction cannot be waived by the defendant nor supplied by invoking the doctrine of estoppel, and anything done before jurisdiction of the subject matter is thus acquired by the filing of such information is void.

In this case the resident District Judge Fred J. Federici made and entered an order on the 12th day of December, 1949, requesting the Hon. E. T. Hensley, Jr., Judge of the

Ninth Judicial District to preside in the cause "to its final disposition and in all its phases" (Tr. p. 1). Such order was made and entered one day before the preliminary hearing (Tr. p. 36) and one day before the filing of the information in the District Court (Tr. p. 2).

It is the contention of appellants under this point that the order requesting Judge Hensley to preside in the case, being made and entered before the filing of the Information and thus before the District Court acquired jurisdiction of the subject-matter, was void, insofar as it undertook to confer upon Judge Hensley the power to try the case to the jury in the District Court.

Appellants contend that Judge Hensley thus sat in the trial of this cause without lawful authority, and that all proceedings in the District Court after the filing of the information were for that reason utterly void.

Appellants maintain that they have thus never been lawfully tried before a competent court.

The Constitution of the State of New Mexico provides:

> "No person shall be held to answer for a capital, felonious or infamous crime unless on a presentment or indictment of a grand jury or information filed by a district attorney."
> Article 2, Section 14, Constitution of New Mexico.

The defendants in this cause were not even in jeopardy, if the Court was not competent to try the cause.

> "A defendant is placed in jeopardy when, after issue joined upon a valid indictment *before a competent court,* the jury is empanelled, etc."
> *U. S.* vs. *Aurandt,* 15 N. M. 292, 107 Pac. 1064, 27 L. R. A. (N. S.) 1181.

The general law applicable to the question as to whether or not the order of the resident District Judge (Tr. p. 1)

was void because made and entered before the filing of the information is as follows:

> "Jurisdiction to try and punish for a crime cannot be acquired otherwise than in the mode prescribed by law, and if it is not so acquired any judgment is a nullity."
>
> 16 C. J. 176, Note 77, *People* v. *Hermans,* 125 N. Y. S. 143.
>
> "A formal accusation is essential for every trial for crime and without it the Court acquires no jurisdiction to proceed, even with the consent of the parties, and that form of accusation is essential."
> Ex. p. Bain, 121 U. S. 1.

In a Colorado case cited on the foregoing point, the Colorado Supreme Court said:

> "Courts can entertain jurisdiction of causes only in the methods prescribed by law, and an agreement of the parties in contravention of such provisions has no force or effect."
> *Morse* vs. *People,* 43 Colo. 118, 95 Pac. 285.

In 1928, the New York Court of Appeals held:

> "The constitutional provision for indictment cannot be waived by one accused of crime."
> *People* vs. *Christian,* 249 N. Y. 314, 164 N. E. 111.

In Joyce on "Indictments," the rule is stated:

> "The legislature may do many things, but it cannot lawfully dispense with any of the substantial protections with which the Constitution surrounds the person accused of crime."
> Joyce, Indictments, 2d Ed. Secs. 13, 30, 41, 43, 46, Ex Parte Bain, 121 U. S. 1-6, 30 L. Ed. 849.

In the case at bar, we find the resident District Judge undertaking to act in respect to the trial of the accused,

even before the preliminary hearing had been held (Tr. pp. 1 and 36). If he did not intend to affect the substantial rights of the defendants with respect to their trial in District Court, even before they were bound over for the action of the District Court, then Judge Hensley as trial judge sat in the trial of this cause with authority, and all proceedings following the filing of the Information was void. If the order (Tr. p. 1) was intended to designate Judge Hensley to try the cause in the District Court it was premature and void. Appellants contend that, under the constitutional provision hereinbefore quoted, until the information was filed there was no case to be tried to the jury, and any order designating a judge to try such cause before the Court obtained jurisdiction of the subject matter, was an impairment of their rights, and was not consistent with orderly administration of Justice.

> "Jurisdiction to try offenses is ordinarily acquired by an indictment or in some jurisdictions by an information."
> *State* v. *Woods,* 66 N. J. L. 458, 49 A. 716.
>
> "After acquired jurisdiction cannot be made to relate back and cure the defect."
> *Hoover* vs. *State,* 110 Ind. 349, 11 N. E. 434.

In the case just referred to, the Court went on to say:

> "Where the defendant is in custody, the prosecution necessarily dates from the time of filing the affidavit and information. The information is based upon the affidavit and when both are filed the prosecution must be said to have been commenced. If the Court then has any jurisdiction of the subject matter of the charge, that jurisdiction is thereby invoked. If it has not then any such jurisdiction the proceeding is without avail. . . . to so carry back an after acquired jurisdiction would be very much like sustaining a prosecution which was commenced before the alleged crime was committed."

"Where an indictment or information is invalid the Court is without jurisdiction."
People vs. *Minto,* 149, N. E. 241, 318 Ill. 293;
Woodham vs. *State,* 28 Ala. App. 62, 178 So. 464.

If the foregoing statement is true, how much more so would the Court be without jurisdiction, where the Information had not been even filed. Of course the Court had power under the Constitution, Article 6, Sec. 15, Constitution of New Mexico, to appoint or designate the judges of other districts, in a proper manner in respect to cases within his jurisdiction, but insofar as said order sought to give Judge Hensley the power to sit in the trial of said cause, it was premature and void.

The Order (Tr. p. 1) made and entered by the resident District Judge referred to Sec. 15 of Article 6 of the Constitution of New Mexico as the authority for making the order. The applicable portion of such section is as follows:

"Any district judge may hold district court in any county at the request of the judge of such district."
Sec. 15, Article 6, Constitution of New Mexico.

The constitutional provision conferred upon the resident district judge involved in this cause the right to request Judge Hensley to hold District Court in the County of Union, and conferred upon Judge Hensley the power to hold District Court in such county upon such request, but cannot be taken to vest jurisdiction over the subject matter in the District Court over criminal cases not yet before that Court, and, in fact, not yet in existence.

The order did not request Judge Hensley to hold District Court in the County of Union, generally, or for any certain period. It limited the request, by its own terms, to "the above styled and numbered cause," (Tr. p. 1) which cause did not at that time exist.

Again we refer to the Constitution of New Mexico:

> "... nor shall any person be denied the equal protection of the laws."

Section 18, Article 2, Constitution of New Mexico.

If the preliminary criminal accusation against appellants had been filed before some Justice of the Peace of Union County, and had been pending there awaiting preliminary hearing on the day the order was signed requesting Judge Hensley to sit in said cause, the order would have been void for all purposes because made and entered before the Court acquired jurisdiction of the *res*.

How then can the rights of these appellants in connection with their trial in the District Court be affected, if they are denied the equal protection of the laws, by an order which would not have affected other persons in the same class—i.e. defendants awaiting preliminary hearings before some Justice of the Peace, when the appellee had enjoyed complete control over the question of whether the preliminary hearing should be instituted before a Justice of the Peace or before a District Judge.

It is obvious that if there was a want of jurisdiction over the subject matter during the purported trial of petitioners, and if they were "tried" by a Judge not competent to do so, there would be a violation of their rights to a fair and impartial trial guaranteed by the 14th Amendment to the Federal Constitution, and such an attempted trial and conviction would be a violation of the "due process" clause of the Constitution of the United States.

Stewart vs. *Michigan*, 232 U. S. 665, 58 L. Ed. 786;
Filer vs. *Steele*, 228 Fed. 242;
Jamison vs. *Wimbish*, 130 Fed. 351.

Petitioners so contended before the Supreme Court of the State of New Mexico (Tr. pp. 583-584) and the ques-

tions were explicitly considered and overruled by that Court (Tr. p. 684).

Points Two and Five

The Petitioners Contended Before the Supreme Court of the State of New Mexico That the Failure of the Trial Court to Give Their Requested Instruction Number 6 Was in Violation of a Statute of the State of New Mexico, Being Section 42-704 of the 1941 Compilation of the New Mexico Statutes, and Violated Their Constitutional Rights Under the 14th Amendment.

The Statute was in words and figures as follows, to-wit:

> "*Description of bovine animals—Proof of brand—Prima facie evidence of ownership.*—In the prosecution of any offense arising under the laws of this State in regard to the unlawful taking, handling, killing, driving, or other unlawful disposition of animals of the bovine kind, the description 'neat cattle' in any indictment shall be deemed sufficient, and the proof of the brand by a certified copy of the registration thereof in the brand book, under the seal of the cattle sanitary board, certified to by the secretary of said board, shall be sufficient to identify all horses, mules, asses or neat cattle, and shall be *prima facie* proof that the person owning the recorded brand is the owner of the animal branded with such brand."

Said defendants' Requested Instruction Number 6 was in words and figures, as follows, to-wit:

> "*Defendants Requested Instruction No. 6*
>
> "In the prosecution of any offense arising under the laws of this State in regard to the unlawful taking, handling, killing, driving or other unlawful disposition of animals of the bovine kind the proof of the brand by a certified copy of the registration thereof in the brand book, under the seal of the cattle sani-

tary board, certified to by the secretary of said board, shall be sufficient to identify all neat cattle, and is primary proof that the person owning the recorded brand is the owner of the animal branded with such brand, and in this case if you find from the evidence that Kenneth Reed is the owner of the recorded brand that you find from the evidence was on the one head of neat cattle, a bull calf, for the stealing of which they are charged with in Count 2 of the information as amended, the ownership of said brand by Kenneth Reed is *prima facie* evidence that the defendants owned the animal in question and in deciding this case you are to take such *prima facie* evidence into consideration along with the other evidence in the case, and the law contained in the Court's instructions in arriving at your verdict." (Tr. pp. 478, 27, 28).

The defendants, at the trial of said cause, upon the refusal of the trial court to give the Requested Instruction No. 6, made the following objections of record at the time, to-wit:

> "And the defendants except to the Court's refusal to give Requested Instruction No. 6 for the reason that said requested instruction is not covered anywhere in the Court's instructions, and that the defendants, under the provision of Section 42-704 of the 1941 Compilation of the Statutes of New Mexico, are entitled to said Instruction" (Tr. p. 409).

These Petitioners, as appellants before the Supreme Court of the State of New Mexico, renewed the objections made at the trial and contended (Tr. p. 478) that the refusal of the trial court to give said Instruction constituted reversible error and called attention to the fact that the State placed the certified copy of the duly recorded brand certificate under the seal of the Cattle Sanitary Board in evidence that gave K. B. Reed, one of these Petitioners, as owner of the brand "M right shoulder, Slash left ear," and that it was proved by the prosecution by direct evi-

dence and admitted by the defendants that the bull calf in defendants' possession had been branded by them with that duly recorded brand, and that said defendants had asserted that the calf in their possession belonged to one of their cows (Tr. p. 186).

These Petitioners, as appellants before the Supreme Court of the State of New Mexico, in their Brief in Chief had called the Court's attention to the importance of the point in the following language:

> "It is unthinkable that the State would be accorded the benefit of the rule of evidence fixed by the unequivocal terms of that statute, but that the defendant would be denied the benefit of the *prima facie* presumption" (Tr. p. 481).

and again in reference to that point said:

> "It is not for us to question the wisdom of the legislature in enacting this rule of evidence, but it would be entirely contrary to our ideas of a fair and impartial trial, to say that a rule of evidence can have no application in any such case where it would benefit the defendant, but can be applied when its application would tend to have a harmful effect upon a defendant, but applicability of the rule is answered by the wording of the statute, 'In the prosecution of *any* offense arising . . . etc.' 'and shall be *prima facie* proof that the person owning the recorded brand is the owner of the animal branded with such brand'" (Tr. p. 481).

The Supreme Court of New Mexico, in its decision rendered on the 16th day of March, 1951, stated:

> "It is obvious that the statute merely sets up a procedure that may be followed by the State in a criminal prosecution of this kind to prove ownership of the animal involved. The statute was not intended to be available to a defendant in such a case (Tr. p. 569).

These Petitioners, as appellants, after the final judgment of the Supreme Court of the State of New Mexico, in their brief upon their motion for a rehearing again called to the attention of the Supreme Court of the State of New Mexico the fact that said opinion is erroneous and violative of the United States Constitutional guarantee of a fair and impartial trial and denied these defendants due process and the equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States (Tr. p. 633).

The Supreme Court of New Mexico rendered this decision in the face of three decisions of that Court made before this Statute was passed that proof of a recorded brand is sufficient to establish *prima facie* ownership of all animals bearing such brand.

Pryor v. *Portsmouth Cattle Co.*, 6 N. M. 44;
Chavez v. *Territory*, 6 N. M. 455;
Gale and Farr v. *Salas*, 11 N. M. 211.

It has been held that since it is competent for the legislature to enact a statute making proof of one fact *prima facie* evidence of the main fact in issue, and the enactment of such a statute is but the declaration of a rule of evidence, a statute which makes proof of a recorded brand *prima facie* evidence that an animal bearing that brand belongs to the owner of the brand is a valid declaration of a rule of evidence, since the statutory evidentiary fact is closely related to, and naturally tends to prove, the main fact, viz., the ownership of the animal.

State v. *Randolph* (1917), 85 Or. 172, 166 Pac. 555.

In a prosecution for stealing a steer, where the evidence of the State was circumstantial, and defendant had offered evidence tending to explain possession, it was prejudicial error to refuse to instruct concerning the possession of stolen goods.

Ibid.

In this same case the Court said:

> "The refusal to instruct concerning the possession of stolen property, was prejudicial error, especially since the State asked for a conviction on circumstantial evidence, and the defendant had offered evidence which he claimed tended to explain the possession."

By not following a statute of the State of New Mexico definitely provided for just such a case and giving definite weight to the plain words of the Statute, the Court in so acting created an artificial presumption of guilt from facts which are not only consistent with innocence, but which are not even a constituent part of the crime when committed, and in so doing held that it has the power to take away a judicial trial, or at least substantially reduce in it the very element which makes it judicial.

This decision is in accord with Wigmore on Evidence, 3d Edition, Sec. 1356.

It is practically undisputed that the legislature may provide by statute in civil as well as in criminal proceedings that certain facts shall be *prima facie* or presumptive evidence of other facts.

The Supreme Court of the United States followed this principle in the following cases:

Casey v. *U. S.* (1928), 276 U. S. 416; 48 S. Ct. 373; 72 L. Ed. 633;

Bandini Petroleum Co. v. *Superior Ct.* (1931), 284 U. S. 8; 76 L. Ed. 136; 78 A. L. R. 286;

Heiner v. *Donnan* (1932), 285 U. S. 312, 76 L. Ed. 772, 52 S. Ct. 358;

Atlantic Coast Line R. Co. v. *Ford* (1933), 287 U. S. 502; 77 L. Ed. (Adv. 355), 53 S. Ct. 249;

Kirch v. *Atlantic Coast Line R. Co.* (1930 C. C. A. 5th), 38 F. (2d) 963.

By denying the requested instruction and holding that the Statute did not apply to appellants in this case, the Court created a presumption of guilt, and in doing so violated the privileges and immunities of citizens of the United States, definitely, and contrary to the statute of the State of New Mexico heretofore cited, and denied them due process of law, the equal protection of the laws and a fair and impartial trial. The action of the highest State Court upon this question likewise violated the same constitutional rights.

Points Three and Four

The District Court of New Mexico for the Eighth Judicial District, and the Supreme Court of New Mexico Failed to Give Adequate and Proper Consideration to a Scientific Principal of Nature, To-wit, the Fact That a Tattoo Mark Placed on An Animal Will Increase With the Growth of the Animal.

The general rule deducible from the cases which have ruled either directly or inferentially upon the question under discussion, is that the testimony of a witness should be rejected and disregarded where it is opposed to unquestioned and unquestionable laws of nature that lie within the Court's judicial knowledge, or is clearly in conflict with scientific principles as established by the laws of physics or mechanics.

B. & O. R. Co. v. *O'Neill* (1911), 108 C. C. A. 115, 186 Fed. 13;

St. Louis Southwestern R. Co. v. *Britton* (1911), 111 C. C. A. 216, 190 Fed. 316;

U. S. v. *Sixty Barrels of Wine* (1915), 225 Fed. 846.

In this case the Supreme Court of New Mexico passed this point off with the statement:

"They (appellants) also point out that the tattoo marks on the calf had not enlarged, although the calf that was lost would have grown since his disappearance" (Tr. pp. 565-566).

Otherwise, this point was never passed upon properly by any Court in New Mexico.

We find in the case of *Easton* vs. *Brant,* 19 F. (2d), pp. 857 and 859, uncontradicted evidence is not, however, necessarily for the Court or a jury, but may be disbelieved where it is contrary to natural and physical laws, opposed to common knowledge, inherently improbable, inconsistent with circumstances in evidence, or somewhat contradictory in itself, especially where the witness is a party or interested, or where in the very nature of things, it is impossible to secure opposing testimony. Citing: 23 C. J. 47.

Courts are not such slaves to the forms of procedure as to surrender their own intelligence to an array of witnesses testifying to an impossibility. They are not required to give credence to a statement that would falsify well-known laws of nature, though a cloud of witnesses swear to it. We recognize that in the realm of science much is yet undiscovered, but any conclusion must appeal to our intelligence, and discuss the subject on the basis of natural laws. If it cannot be discussed on that basis, there is nothing to discuss.

The testimony of a witness which conflicts with natural law is not legitimate evidence, and cannot be considered.

Emrich Furniture Co. v. *Byrnes* (1909), 44 Ind. App. 341, 87 N. E. 1042.

In the case at bar the testimony was clear that the complaining witness placed a tattoo on a calf when said calf was three days old and weighed approximately 75 pounds. When a calf, which the complaining witness claimed was his, was examined, it was found that the tattoo marks were

not substantially larger than those claimed by the complaining witness to have been put on the calf which he tattooed, and yet the calf which was examined weighed at that time about 500 pounds and was seven months old.

It is the contention of appellants that by not considering so obvious a fact of nature and a fact so much in harmony with general knowledge which ought to be known by any intelligent man, the Courts of New Mexico in so ruling denied to these defendants the protection of the laws of the United States of America by which they are entitled to benefit, and misled the jury to such a degree as to deny to them that equal protection of the laws which has many times been given by other Courts under similar circumstances; that the jury could not be an impartial jury under such cimcumstances and their decision could not be in accordance with the evidence to which a citizen of the United States is entitled under the Constitution, and the denial of which violates the due process of law required by the Constitution of the United States.

Summary

It is, therefore, the contention of appellants that they were denied due process of law in that they were not tried by a court of competent jurisdiction; that they did not have a trial according to the forms and modes prescribed for such trial; that they were deprived of rights to which they were lawfully entitled, and that the conclusion arrived at was hastened to an unseemly termination in violation of equal protection of the laws as defined in the following cases:

Duncan v. *Missouri*, 152 U. S. 382;
In re Grice, 79 Fed. 645, *reversed in Baker* v. *Grice*, 169 U. S. 284;
Atchison, etc. R. Co. v. *Mathews*, 174 U. S. 104;
McPherson v. Blacker, 146 U. S. 39;

and that the due process of law as defined in this Court in the following cases was not accorded to these defendants:

Ker v. *Illinois*, 119 U. S. 436;
Mahon v. *Justice*, 127 U. S. 700;
In re Converse, 137 U. S. 624;
Leeper v. *Texas*, 139 U. S. 462;
In re Manning, 139 U. S. 504;
Murphy v. *Massachusetts*, 177 U. S. 155;
Urquhart v. *Brown*, 205 U. S. 179;
Watson v. *Maryland*, 218 U. S. 173;
Garland v. *Washington*, 232 U. S. 642;
Stewart v. *Michigan*, 232 U. S. 665;
Frank v. *Mangum*, 237 U. S. 309.

Respectfully submitted,

ROBERT B. BENNETT,
Attorney for Appellants,
Albuquerque, New Mexico.

ROBERT HOATH LA FOLLETTE,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

KENNETH REED AND REBECCA REED,
Petitioners,

vs.

STATE OF NEW MEXICO,
Respondent

CERTIFICATE OF COUNSEL FOR PETITIONERS RESPECTING THE AMENDED STIPULATION FOR THE PRINTED RECORD AND MOTION TO HAVE CERTAIN COST OF PRINTING TAXED AGAINST RESPONDENT.

UNITED STATES OF AMERICA,

State of New Mexico, County of Bernalillo, ss.

ROBERT B. BENNETT, counsel for the above named petitioners hereby certifies:

1. That he prepared the proposed stipulation for reduction of the printed record to include only those portions of the record proper deemed essential in connection with the questions presented by the petition herein, a true copy of which proposed stipulation is attached hereto as Exhibit One, and made a part of this certificate by reference.

2. That he submitted said proposed stipulation to counsel for the respondent, to-wit: Joe L. Martinez, Attorney General of the State of New Mexico, but that after considering the same, he refused to sign said stipulation, but submitted additional matter to be included in the printed record, none of which appears to counsel for petitioners to be essential in connection with the questions presented by the petition.

3. That petitioner's proposed stipulation contained, in the opinion of counsel for petitioners, all matter necessary in connection with the issues raised herein, and reduced the 690 page typewritten record proper to a printed record of less than 110 typewritten pages, and lowered the costs and charges of printing said record from a cost of about $2,760.00, if the entire record were printed, to a cost estimated by counsel as approximately $450.00.

4. That it thus became necessary for petitioners to stipulate with counsel for respondents that their requested additional matter be printed, and these petitioners included in the stipulation their protest against such additional matter being included, but were compelled to either stipulate or print the entire record. That the above figures are based upon an amended stipulation filed herein, which was merely to omit the briefs on appeal from the printed record to comply with the practice before this Court.

5. That much of the matter which respondent insisted should be printed was testimony tending to show that the three-day-old Caviness calf had markings, hair-coloring and physical form similar to that of the seven-month-old calf that was on the Reed ranch. The additional matter was entirely immaterial, for, if the Supreme Court of New Mexico should have, and this Court does take judicial notice of the law of nature with respect to the growth of an animal's skin, and if this Court having done so, determines that the failure of the tattoo mark on "the Reed calf" to be substantially larger than the mark on the Caviness calf proves the innocence of petitioner, no amount of circumstantial evidence as to similarity of the two animals would have any bearing on the issue, and if this Court does not so find and determine, then such evidence likewise would be wholly immaterial.

Apart from the question of judicial notice, every other

point raised by the petition for certiorari having to do with questions of law and a few elementary and undisputed facts and matters of record, all of which were included in petitioner's original proposed stipulation, petitioners respectfully contend that the additional matter imposed upon them by counsel for respondent could serve no useful purpose and could only be beneficial to the respondent, although we realize he never intended that result, (1) in placing a heavy burden of costs upon petitioners, and (2) in confusing the printed record to such an extent as to make it much more difficult for this Court to examine and understand that record.

WHEREFORE, Petitioners pray that the cost and charges for printing the record herein be taxed as follows:

Against Petitioners for 110 typewritten pages thereof.

Against Respondent for the remaining portion covered by the Amended Stipulation.

Petitioners further pray that in order to avoid confusion in the arrangement of the printed record, all matter appearing in the Petitioners' proposed stipulation be printed separately in the first section of said printed record, and that all additional matter insisted upon by respondent be printed separately in a second section of said Record.

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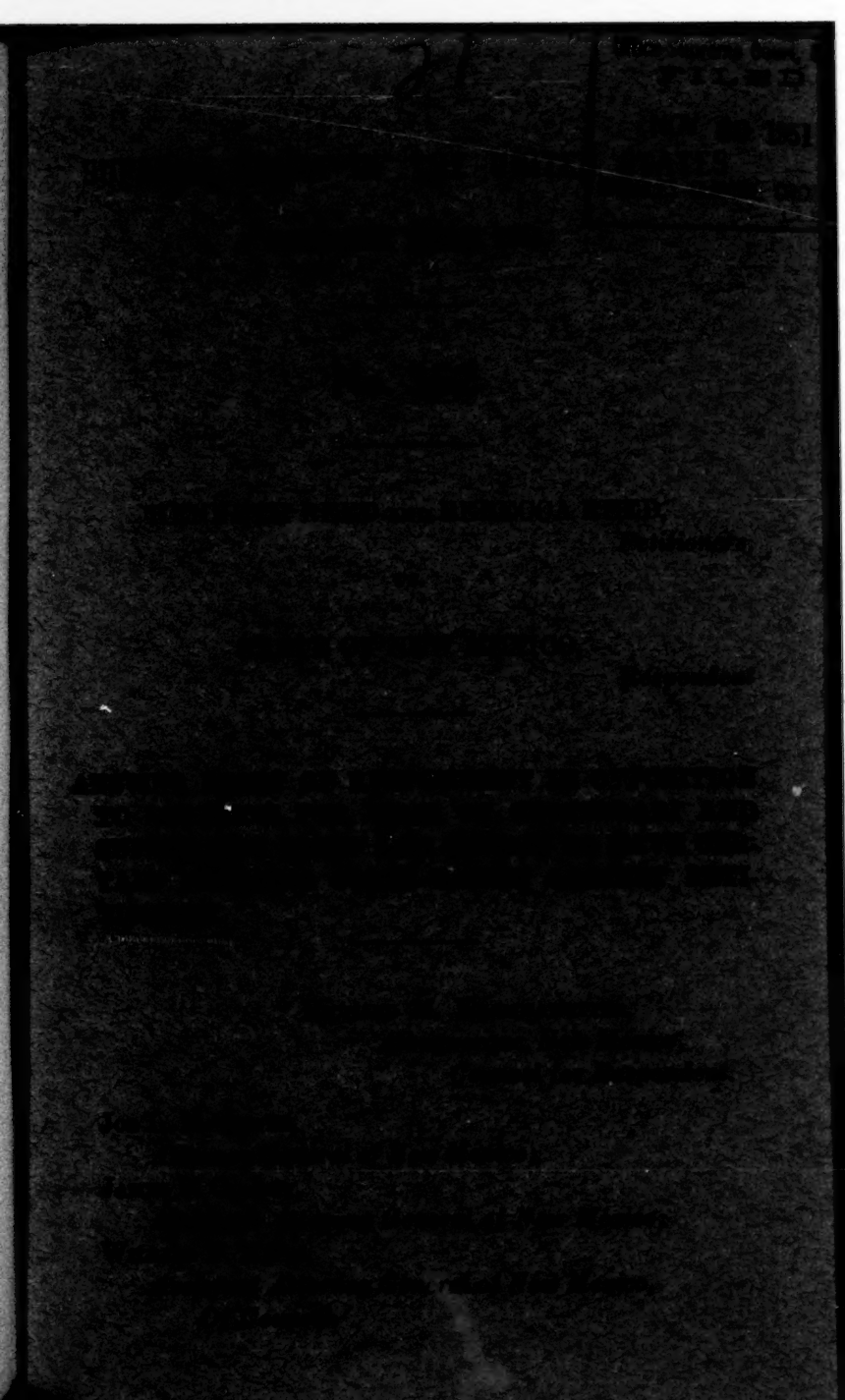
ROBERT HOATH LA FOLLETTE,
Of Counsel.



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United States Constitution, Fourteenth Amendment. 7, 11

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 352

KENNETH REED AND REBECCA REED,
Petitioners,

vs.

STATE OF NEW MEXICO,
Respondent

ANSWER BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF.

To the Honorable Fred M. Vinson, Chief Justice of the Supreme Court of the United States and to the Associate Justices of said Court:

Your Respondent, The State of New Mexico, in answering the petition of Kenneth Reed and Rebecca Reed for a Writ of Certiorari, herewith respectfully submits its Answer Brief.

I

Statement of Jurisdiction

Respondent admits that the federal questions upon which Petitioners seek to rely were timely raised before the

Supreme Court of New Mexico. Respondent denies, however, that Petitioners were deprived of any of their constitutional rights, as will appear more fully in the argument of this brief.

II

Statement of Facts

Respondent has no objection to the Petitioners' statement of the facts.

III

Statement of the Case

Respondent objects to the Petitioners' statement of the case in the following particulars:

1. Page 13 of Petitioners' supporting brief. The Respondent wishes to call to this Honorable Court's attention that Petitioners' motion for rehearing was denied by the Supreme Court of New Mexico after that Court had considered the motion, together with the briefs of counsel (See pr. r. 120).

2. Respondent objects to the statement concerning Judge Federici, on lines 24 and 25, page 14, of Petitioners' brief, as being a conclusion of law rather than a statement of fact.

IV

ARGUMENT

POINT ONE

In Answer to Point One of Argument in Petitioners' Supporting Brief

The crux of Petitioners' argument under Point One is that the very fact Judge Federici entered the order (pr. r. 1) requesting Judge Hensley to preside over this cause

before the preliminary hearing and the filing of the information means that Judge Hensley sat without lawful authority. Therefore, they contend, all proceedings after the filing of the information were utterly void, and consequently, Petitioners have never been lawfully tried before a competent court.

In requesting Judge Hensley to preside, Judge Federici was acting under the authority granted him by *Article 6, Section 15, Constitution of New Mexico,* the pertinent portion of which reads as follows:

> "Any district judge may hold district court in any county at the request of the judge of such district."

The Petitioners admit that this constitutional provision conferred upon Judge Federici the right to request Judge Hensley to hold District Court in Union County, and conferred upon the latter the power to hold court upon such request. (See Petitioners' brief, p. 21.) Petitioners' main objection to the order seems to be that it did not request Judge Hensley to hold court, generally, or for any certain period, but to preside in this particular 'cause'. (See also p. 21 of Petitioners' brief.) Therefore, Petitioners contend, since this particular 'cause' did not exist at the time of the order, no jurisdiction could vest in the subject matter.

It is Respondent's contention, however, that it is not necessary that a matter be pending in a District Court in order to make effective an order such as Judge Federici entered. Nor is it necessary that the order request a Judge to hold court 'generally' or for any particular period. On the contrary, under the constitutional provision in question, such an order may request another Judge to preside for any specified period, or over any specified matter or matters. Respondent respectfully submits that the very language of Section 15 supports this interpretation, and it is

of no consequence that the cause was not technically in existence at the time the order was entered.

Most of the matters which a resident judge hears during a term of court were pending at the beginning of that term, but some of course were not, and arise later. Likewise, it is conceded that in most instances where a Judge holds court upon the request of a resident Judge, the majority of the matters over which he presides during this period were pending at the time the request was made. But the fact a matter was not so pending cannot be deemed fatal. It is settled in New Mexico that when a non-resident District Judge goes into another county by request of the resident Judge, he is vested with all the powers possessed by the resident District Judge. *State* v. *Encinias,* 53 N. M. 343, 208 P. 2d 155. Therefore, if the regular resident Judge has the power to hear a matter which arises, or becomes a 'cause' during a term, a visiting Judge has that same power when asked to preside for a designated period. Respondent contends that this case is in no wise different. Judge Hensley was requested to preside over a matter which, as pointed out by the Supreme Court of New Mexico in its opinion below (pr. r. 104), was expected to be filed and ready for trial within the next few days after the date of the request. It would appear therefore, that if there was any error committed by Judge Federici, it was a mere error of appellation in referring to the matter as a 'cause', before preliminary hearing and the filing of an information. And if such was 'error', it can hardly be of consequence when the objection was raised for the first time on appeal to the New Mexico Supreme Court.

Petitioners recite broad legal propositions on pp. 18-20 of their supporting brief to the effect that jurisdiction to try a crime must be acquired in the mode prescribed by law, or else the judgment will be a nullity. With this contention

we must agree, in general, but it must be noted again that the only real attack the Petitioners make on the jurisdiction is that the order was 'premature'. It is admitted by Petitioners that a preliminary hearing was held by Judge Hensley, on December 13, 1949, and it is a matter of record before this Honorable Court that an information was also filed on that date (pr. r. 3). There is no further contention by Petitioners in their motion or supporting brief that they were denied due process of law by the trial court, other than the allegations that the trial court erred in failing to give a requested instruction, and erred in failing to take judicial notice of a scientific fact. At no time during the lengthy period of this trial did the Petitioners or their counsel raise the question as to the right of Judge Hensley to sit in this cause. On the contrary, Judge Hensley was recognized by Petitioners and counsel as the presiding Judge. In this connection, see in particular the stipulation filed by the parties and counsel on December 12, 1949 (pr. r. 3), and the Notice of Hearing filed by the Petitioners, the then defendants, on January 3, 1950 (pr. r. 6). Respondent respectfully contends that such an objection, not seasonably raised in the trial court, was waived, and could not be considered by the State Supreme Court on appeal.

In *Hoglan* v. *Geddes*, 25 Wyo. 436, 172 P. 137, the Court was faced with a Wyoming constitutional provision similar to Article 6, Section 15 of the New Mexico Constitution. The Court said:

> "Being qualified as the judge of one district, to hold court for another district under conditions authorizing it, and having assumed authority and jurisdiction to preside at the trial of this cause upon an order of the judge of the district wherein the cause was pending, Judge Raymond was at least a de facto judge in the trial and determination of the cause. And any objections to his acting on the ground that he was without

authority or jurisdiction would be waived unless seasonably made. That is the general rule as to special or substitute judges where there is authority by constitution or statute for their selection."

The Court then cited 23 Cyc. 616, which reads as follows:

"Objections to the authority of a special or substitute judge may be waived by act or omission of the party, and ordinarily such objections are waived where they are not promptly made. The objection should be made at or before the trial, and cannot be made for the first time on appeal."

Likewise, in *City of Oakland* v. *Hart,* 129 Calif. 98, 61 P. 779, the Court held that where a Judge is appointed to hear a case in such a manner, and proceeds to hear the case without objection until important matters have been disposed of, all objections to the regularity of the appointment and his power to act are waived.

Again, in *Kane* v. *Ferguson,* 195 Okl. 292, 157 P. 2d 194, the appellant contended that where a case is tried before a special Judge, the record must disclose that the regular Judge was properly disqualified and that the special Judge was selected strictly in the manner provided by law. Otherwise, it was contended, the judgment is void and estoppel does not operate against the raising of the question of the special Judge's jurisdiction. In ruling against the appellant, the Court cited and quoted from a previous Oklahoma case, *McBride* v. *Foote,* 63 Okl. 275, 165 P. 160, where the Oklahoma Supreme Court said:

"Objection to the authority of a special or substituted judge may be waived by the act or omission of a party. The objection should be made at or before the trial, and cannot be made for the first time in this court. Such objections, not having been made at the trial, are deemed to have been waived."

The situation which confronts us here is not too unlike that where a dispute arises as to whether a particular Judge has been disqualified for a particular cause. Such disqualification is provided for by Article 6, Section 18 of the New Mexico Constitution, but it has been held repeatedly in this State that a disqualification may be waived. See *State* v. *Chavez*, 45 N. M. 161, 113 P. 2d 179; *State* v. *Gonzales*, 43 N. M. 498, 95 P. 2d 673; *Hill* v. *Patton*, 43 N. M. 21, 85 P. 2d 75; *State* v. *Garcia*, 47 N. M. 319, 142 P. 2d 552; and *State* v. *Armijo*, 41 N. M. 38, 63 P. 2d 1037. In the *Chavez* case, *supra*, the Court said:

> "It is obvious that disqualification for prejudice may be waived; and it is waived by implication as well as by specific acts of the party having a right to rely thereupon. See Note in 5 A. L. R. 1604, citing numerous authorities."

If a party may waive a disqualification of a Judge by mere implication, how much stronger is the waiver in a case such as is now before this Honorable Court, where the Petitioners were present at the trial, entered their plea, were represented by able counsel, testified in their own behalf, submitted the entire matter to the jury for its determination, and finally, submitted their persons to the Court for sentencing.

It is therefore Respondent's contention that Judge Hensley was properly requested and designated to hold Court below, that he was therefore competent to hear the case at trial, and that consequently Petitioners were not denied a fair and impartial trial in derogation of the Fourteenth Amendment, United States Constitution. Furthermore, any objection, of whatever merit, which Petitioners had to Judge Hensley's hearing the case, not having been seasonably raised below, was waived.

Point Two

In Answer to Points Two and Five of Argument, Petitioners' Supporting Brief

The Petitioners contend under Points Two and Five of their supporting brief that the trial Court in refusing their requested instruction No. 6 created a presumption of their guilt, and by so doing denied them due process of law, the equal protection of the laws, and a fair and impartial trial. Likewise, they contend, in sustaining the action of the trial Court the Supreme Court of New Mexico was guilty of violating these same constitutional rights.

The substance of their request was that the trial Court inform the jury that if the calf was found bearing the brand owned by Kenneth Reed, that would constitute *prima facie* evidence that the Petitioners owned the animal. For this requested instruction, see pr. r. 15 and Petitioners' supporting brief, p. 3. The basis for Petitioners' requested instruction No. 6 is §42-704, New Mexico Statutes Annotated, 1941, the pertinent portion of which reads as follows:

> "In the prosecution of any offense arising under the laws of this state in regard to the unlawful taking—the proof of the brand by a certified copy of the registration thereof in the brand book—shall be sufficient to identify all horses, mules, asses, or neat cattle, and shall be prima facie proof that the person owning the recorded brand is the owner of the animal branded with such brand."

The question in this case below was whether the present Petitioners, or either of them, stole or unlawfully branded a calf, the property of Olen Caviness. It was the burden of the state to show (a) that the calf belonged to Caviness, and (b) that Petitioners, or either of them, stole the calf or unlawfully branded it, or both. These facts the State was obliged to prove, as is the case in all criminal prosecu-

tions, beyond a reasonable doubt. The Petitioners carried no such burden in the Court below, and it was not incumbent upon them to make *prima facie* proof of anything.

It is Respondent's contention that this statute is merely a rule of procedure, for the guidance of the Court, and not a proposition of substantive law. It is our contention that the statute means that as to the burden of proof in a criminal prosecution, a *prima facie* case as to ownership is made by the party bearing the burden of proof as to such matter when a recorded brand, showing that ownership, is placed in evidence. However, ownership may also be proved in other ways. (See *Chavez* v. *Terr.*, 6 N. M. 455, 30 P. 903; *Gale & Farr* v. *Salas*, 11 N. M. 211, 66 P. 520.) And as has been mentioned above, even proof of ownership as alleged does not end the inquiry as to whether the defendant is guilty as charged. A defendant is presumed to be innocent until his guilt is established beyond a reasonable doubt, and this presumption remains with him throughout the trial. It is clear that such a presumption of innocence accompanied these Petitioners. (See Court's instructions, pr. r. 6-13.)

What is the meaning of *prima facie* evidence, or *prima facie* proof? In 20 Am. Jur. 33, we find this definition:

> "The term 'prima facie evidence', which frequently appears in cases, denotes evidence which, if unexplained or uncontradicted, is sufficient in a jury case to carry the case to the jury and to sustain a verdict in favor of the issue which it supports but which may be contradicted by other evidence, and is thus distinguished from conclusive evidence which the law does not allow to be contradicted."

See also *Meline* v. *Klineberger*, 108 Calif. App. 60, 290 P. 1042; *Paul* v. *Gleason*, 74 P. 2d 47, 114 A. L. R. 838; *State* v. *Wilkerson*, 164 N. C. 431, 79 S. E. 888; *Barnett* v. *Wedgewood et al.*, 28 N. M. 312. Bearing the foregoing definition

and argument in mind, it is difficult to see how the Petitioners can claim that the trial Court created an 'artificial presumption of guilt'. We know that *prima facie* evidence, if uncontradicted, is sufficient merely to take the case to the jury, or trier of facts. In this case, as in all criminal prosecutions, it was incumbent upon the State to prove, beyond a reasonable doubt, the guilt of the Petitioners as charged. The usual presumption of innocence accompanied the Petitioners throughout the trial. The jury was properly charged as to all these matters and it is our contention that the instructions of the Court protected adequately the Petitioners' constitutional rights.

To summarize this portion of the argument, it is the Respondent's contention that the statute in question lays down a rule for the guidance of the court. The proposition stated therein is not one of concern to the jury; the burden is on the State and the statute does no more than to declare a rule of procedure.

If there were any substance to the argument made by the Petitioners, it may be readily seen what ridiculous results might follow. A defendant might be seen by numerous witnesses in the act of placing his brand upon a calf not his own, and then upon prosecution for unlawfully branding, request an instruction that the brand itself is *prima facie* evidence of his ownership. To uphold Petitioners' interpretation of § 42-704, *supra*, would also be to invite widespread stealing and branding of young calves not already branded when stolen.

Petitioners also contend that the decision of the State Supreme Court in this cause is contrary to three previous New Mexico decisions on this subject, rendered before § 42-704 was passed; *Pryor* v. *Portsmouth Cattle Co.*, 6 N. M. 44, *Chavez* v. *Terr.*, *supra*, and *Gale & Farr* v. *Salas*, *supra*. Respondent does not so construe these decisions,

but, on the contrary, contends that all of these decisions, and the *Chavez* case in particular, tend to support the decision of the New Mexico Supreme Court in this cause. But even if it be conceded that the New Mexico Supreme Court did overrule previous pronouncements in rendering its decision, do Petitioners contend that such action amounts to denial of due process under the Fourteenth Amendment? In *Brinkershoff-Faris Co.* v. *Hill*, 281 U. S. 673, the United States Supreme Court found that a Federal question existed, since the appellant had been denied an opportunity to have his complaint heard by the State courts, in violation of the due process clause of the Fourteenth Amendment. This was the ground for the Court's assuming jurisdiction, but regarding the matter which concerns us here, the Court said, speaking through Mr. Justice Brandeis:

> "It is true that the courts of a state have the supreme power to interpret and declare the written and unwritten laws of the state; that this court's power to review decisions of state courts is limited to their decisions on federal questions; and that the mere fact that a state court has rendered erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction upon this court.—Undoubtedly, the state court had the power to construe the statute dealing with the State Tax Commission; and to reexamine and overrule the Laclede case. Neither of these matters raises a federal question; neither is subject to our review."

The Respondent respectfully submits that even if this Honorable Court should agree with the Petitioners' contention that the decision of the New Mexico Supreme Court was made in the face of established New Mexico law, the

ruling of this Court in the *Hill* case, *supra*, must still pertain to this cause.

POINT THREE

In Answer to Points Three and Four of Argument, Petitioners' Supporting Brief

The Petitioners contend under Points Three and Four of their supporting brief that the failure of the trial court and the New Mexico Supreme Court to take judicial notice of the 'fact' that a tatoo mark placed on an animal will increase with the growth of the animal constituted denial of due process under the Fourteenth Amendment. Petitioners likewise contend on p. 10 of their petition proper that this Honorable Court must now take judicial notice of such fact. Respondent will consider these propositions in order.

As to the trial Court's taking of judicial notice of this 'fact', it must be pointed out that nowhere in the course of the trial was that Court asked, even by implication, to take judicial notice. In *Arkansas* v. *Kansas and Texas Coal Co.*, 183 U. S. 185, this Court said:

> "And as to judicial knowledge the principle applies 'that the right of a court to act upon what is in point of fact known to it must be subordinate to those requirements of form and communication which regulate the mode of bringing controversies into court, and of stating and conducting them'. Thayer, Evidence, Ch. 7, p. 281."

It is true that in Rule 44, New Mexico Rules of Civil Procedure, applying to New Mexico District Courts, it is stated that the courts shall take judicial notice of 'the laws of nature, the result of time * * *' However, it is Respondent's contention that, even so, the question of taking judicial notice must be properly presented to the trial

court for its consideration. Of course, this paragraph assumes that the alleged fact of growth of tatoo marks would be, if seasonably presented, a proper subject for judicial notice. This the Respondent vigorously contests and denies, as will appear more fully below.

What conditions must be met before a Court can take judicial notice of laws of nature or scientific facts? In 20 Am. Jur. 92, we find this language:

> "The courts will ordinarily take judicial notice of the operation and effect of natural laws and of nature's powers and forces, with the limitation that such notice is limited to those natural laws which are of uniform occurrence, invariable in their action, and of common knowledge."

Again, in 20 Am. Jur. 111, it is said:

> "Judicial knowledge is taken of scientific facts which are generally or universally known."

Respondent submits that the "fact", if it be a fact, of the growth of tatoo marks fails to meet this test. It is not a matter of common knowledge, and not a scientific fact of universal knowledge, if it be true at all. Furthermore, it is difficult to determine from a reading of Petitioners' argument just what the "fact" is of which they contend the Courts should take judicial notice. We do know from the evidence and the Petitioners' admission that the mark did increase in size to some small extent. (See Petitioners' supporting brief, p. 30.) Do Petitioners contend the fact is that the size of the mark will increase in direct proportion to the growth of the animal? If that be the contention, there is even more reason for holding that this "fact" fails to meet the test of a matter which is generally or universally known.

In *Brown* v. *Piper*, 91 U. S. 37, this Court, speaking

through Mr. Justice Swayne, pointed out that usually Courts will take judicial notice of whatever is generally known within the limits of their jurisdiction. However, the Court said:

> "The power is to be exercised by courts with caution. Care must be taken that the requisite notoriety exists. Every reasonable doubt upon the subject should be resolved promptly in the negative."

For other cases setting out this requirement of "notoriety" see *Whitney* v. *U. S.*, 167 U. S. 259; *McLean* v. *Denver & Rio Grande Railway*, 203 U. S. 38; *Greene* v. *Ewell*, 1 N. M. 166; *Holton* v. *Jones*, 25 N. M. 374. It is therefore submitted that the trial Court, under any circumstances, could have very properly refused to take judicial notice for these reasons.

It does not appear from the New Mexico Supreme Court's opinion (pr. r. 103-111) what its reasons were for not taking judicial notice of the growth of the tatoo marks. It is Respondent's contention that there are two good reasons for its refusal or failure to do so. Firstly, the Court undoubtedly felt that the matter was not a proper subject for judicial notice. On this ground, the Supreme Court's reasons for refusal would be in no wise different than the reasons for the trial court's refusal or failure to take such notice. (See *supra.*) Secondly, the State Supreme Court could have very properly refused such notice, without even scrutinizing the fact to be noticed, on the ground that the matter had not properly come to the attention of the court below. The general rule is stated in 3 Am. Jur. 375:

> "A party who depends upon the taking of judicial notice by the appellate court of local conditions within the judicial knowledge of the trial court should see to it that in some form that knowledge is brought into the record, since, as a general rule, if the attention of

> the trial court is not called to a fact within its judicial knowledge and such fact is not judicially noticed below, the appellate court will not take judicial notice of it."

For other authorities supporting this rule, see also *Line* v. *Line*, 86 Atl. 1032, 119 Md. 403; *Byrd* v. *State*, 102 So. 223; Anno. Cases 1914 D, p. 196 (Note.).

This precise point above does not seem to have been decided by reported New Mexico decisions. However, the Respondent submits that after reading *Sunmount Co.* v. *Nagel*, 30 N.M. 450, there can be very little doubt that New Mexico would follow the general rule recited above. In the *Sunmount* case the Court enunciated the rule that a theory of the admissibility of rejected evidence, not advanced in the trial Court, cannot be considered on appeal. Appellants contended that certain testimony should have been admitted by the trial Judge to show a subsequent parole modification of a contract, or to explain, by parole evidence, a patent ambiguity in the contract. The New Mexico Supreme Court said, on p. 453 of its opinion:

> "It appears from this record that counsel presented no such claim at the trial as is now advanced although given by the court the opportunity to state the purpose for which the testimony was offered. Whether the testimony was proper for the purposes now claimed, we need not consider. It is apparent that it was excluded upon the theory that it was an attempt to violate the parole evidence rule, and that the court's attention was not called to any proper theory upon which the evidence could be admitted."

Respondent contends that this Sunmount case is very similar, in all important particulars, to the authorities cited previously where the question of judicial notice was not presented to the trial Court.

Concerning this Honorable Court's taking judicial notice

of the growth of tatoo marks, after the New Mexico Courts have refused to do so, Respondent respectfully submits the following, in addition to the points already discussed. In *Wear* v. *United States*, 245 U.S. 154, this Court laid down the rule that in certain cases whether a Court may take judicial notice is a question of local law. In that case the plaintiffs in error contended that inasmuch as navigability was the test the Kansas Court applied, then the plaintiffs in error were entitled to go to a jury on the fact of navigability of the Kansas River at Topeka, and that it was error for the case to have been disposed of on a motion to quash. Mr. Justice Holmes stated, in this regard:

> "But there is no constitutional right to trial by jury in such a case, and if a state court takes upon itself to know without evidence whether the principal river of the state is navigable at the Capitol of the state we certainly cannot pronounce it error. In this respect it is a question of state law."

It is Respondent's contention that this same doctrine may be applied to cases where a state Court refuses to take judicial notice of a matter which is purported to be of local, rather than national, knowledge. New Mexico is a cattle state, and therefore judicial notice can be taken of certain matters pertaining to cattle of which a Court from an Eastern state would not take notice. If the Supreme Court of New Mexico had found the fact to be as Petitioners asserted, concerning tatoo marks, and had taken judicial notice of it, this Honorable Court would have undoubtedly followed the *Wear* case, *supra*, in upholding such a ruling, even though this Court might have felt that such a matter could not have been properly noticed by an Eastern Court. It is our contention that the same ruling should apply where

the state Court has refused to take judicial notice of a matter. Here also it is a question of state law, which this Honorable Court will not disturb.

The Petitioners' other contentions under Points Three and Four may be discussed very briefly. The Petitioners assert that the New Mexico Supreme Court denied due process in failing to consider more fully the question of judicial notice presented to it upon appeal. It is Respondent's position that the State Supreme Court's refusal to take judicial notice, however tacit, was sufficient and all that was required. It is interesting to note that the Petitioners cite no authority in support of the assertion made in Point Four. (Petition for Certiorari, p. 3).

The Petitioners assert on p. 29 of their brief that a jury has the right to disbelieve uncontradicted evidence when such evidence is contrary to natural and physical laws. With this contention Respondent is inclined to agree. The jury members of the trial in this case could have, and might well have, given effect to such inferences as matters of common knowledge or personal observation might reasonably have drawn from the facts proved. See 20 Am. Jur. 55. But this is hardly an argument for the taking of judicial notice.

Summary

It is therefore the contention of the Respondent that the Petitioners were tried by a competent tribunal below, and were not therefore denied due process of law under the Fourteenth Amndment on that ground; that the Petitioners were not denied equal protection of the laws in the trial Court's interpretation of §42-704, New Mexico Statutes Annotated, and through the New Mexico Supreme Court's affirming that interpretation; and that Petitioners were not denied due process of law in the failure of the trial Court

and the Supreme Court to take judicial notice of the alleged fact of the growth of tatoo marks.

WHEREFORE, the Respondent prays that the petition be dismissed, with costs.

Respectfully submitted,

RICHARD M. KRANNAWITTER,
Counsel for Respondent.

JOE L. MARTINEZ,
Attorney General of New Mexico;
JAMES B. COONEY,
Assistant Attorney General of New Mexico;
WILLARD F. KITTS,
Assistant Attorney General of New Mexico,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

KENNETH REED AND REBECCA REED,
Petitioners,

vs.

STATE OF NEW MEXICO,
Respondent

CERTIFICATE OF JAMES B. COONEY, OF COUNSEL FOR RESPONDENT, STATE OF NEW MEXICO, REQUESTING THE STIPULATION FOR THE DIMINUTION OF THE PRINTED RECORD AND RESPONDENT'S MOTION TO HAVE CERTAIN COSTS OF PRINTING TAXED AGAINST PETITIONERS.

UNITED STATES OF AMERICA,
State of New Mexico,
County of Santa Fe, ss:

James B. Cooney, of counsel for the above named Respondent, certifies:

1. That he is the First Assistant Attorney General of the State of New Mexico and is duly authorized to execute this affidavit on behalf of the State of New Mexico and Joe L. Martinez, Attorney General of New Mexico.

2. That this matter was presented before the Supreme Court of the State of New Mexico by former assistant attorneys general; that at the time of the filing of the petition for the Writ of Certiorari by the Petitioners no former assistant attorneys general who were familiar with this case were connected with the office of Attorney General.

3. That on August 2, 1951, counsel for Petitioners delivered the record in this cause, consisting of 690 typewritten pages, to the office of the Attorney General of New Mexico at Santa Fe, New Mexico with the request that a stipulation for diminution of the record, which had been prepared by counsel for Petitioners be executed, and that the same be delivered to said counsel for Petitioners within less than 24 hours; that prior to said time no opportunity had been given to the Attorney General's office to examine the record or the proposed stipulation.

4. That counsel for Petitioners represented that the stipulation for the printed record had to be forwarded to the Clerk of the Supreme Court of the United States for the timely filing of the record unless an extension of time were obtained by counsel for the Petitioners for filing thereof.

5. That at the time of the delivery of such record and proposed stipulation no one connected with the office of the Attorney General was familiar with the contents thereof; that the Attorney General and all assistants were engaged in state business; that in order to accommodate counsel for Petitioners and to enable them to save as much money as possible upon the printed record, this affiant, as First Assistant Attorney General, worked overtime on the night of August 2 and on August 3rd to determine if the proposed stipulation provided for the inclusion of all matters believed needed for a consideration of this case by this Honorable Court; that in addition thereto affiant went to Albuquerque, New Mexico on Saturday, August 4th, and worked with counsel for Petitioners for approximately four hours in order that a stipulation for diminution of the record could be prepared which would include within it all matters believed necessary in this cause; whereupon said stipulation was executed in order that the same could

be forwarded to the Clerk of the Supreme Court for the timely filing of the record by counsel for Petitioners.

6. That affiant is of the good faith belief that the opportunity provided by counsel for Petitioners to stipulate for diminution of the record does not comply with the requirements of Rule 38 of this Court.

7. That thereafter counsel for Petitioners informed this affiant that the Clerk of the Supreme Court had requested that certain matters which would otherwise be included in the printed record be eliminated, pursuant to the rule of this Court; that thereafter the proposed amended stipulation was examined by this affaint and at that time and as a result of such examination this affiant pointed out to counsel for Petitioners that the proposed amended stipulation failed to include therein certain matter which had been originally designated for inclusion in the record by counsel for Petitioners; whereupon a corrected amended stipulation was effected and immediately executed.

8. That affiant is of the good faith belief that not only did counsel for Petitioners fail to give the Respondent reasonable opportunity to stipulate for diminution of the record but affiant is of the good faith belief that Respondent would have been justified in refusing to stipulate in any wise for any diminution of the record by virtue of the unreasonably short time given to Respondent to examine the record and the proposed stipulation originally tendered by counsel for Petitioners.

9. Further answering the motion of counsel for Petitioners, affiant states that the motion for Petitioners fails to state the number of pages of additional printed record included as a result of the stipulation perfected through the efforts of the Attorney General of New Mexico.

10. Affiant further states that in consenting to a stipulation herein provided for diminution of the record affiant

requested that only such part of the record be included as affiant in good faith believed was needed by this Honorable Court for a proper consideration of this case.

WHEREFORE, Respondent prays that all costs herein may be taxed against the Petitioners.

JAMES B. COONEY,
Of Counsel for Respondent,
Santa Fe, New Mexico.

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